Under this section the Industrial Court is not asked to deal with the question of law but to exercise its discretion whether or not to refer certain questions of law to the High Court for a determination Since the Industrial Court is not making an award under section 33A(1) it follows that sub-sections (4) and (5) of section 30 would not be germane to the matter in question and must therefore disregard these irrelevant collateral matters . In our judgment, the passage cited by the learned Judge is not relevant for the purpose of para (c) of section 33A(1) of the Act. Parliament has conferred a discretion on the Industrial Court to be used to promote the policy and objects of the Industrial Relations Act 1967.

The appeal is therefore allowed with costs here and in the High Court below to be taxed. The deposit should be refunded to the appellant.

Appeal allowed.

Solicitors: *Shook Lin & Bok; D.P. Xavier & Co.*

DATIN HAJJAH ZALEHA & ORS. v. PERKASA TRADING SDN. BHD. & ANOR.

[O.C.J. (Wan Mohamed J.) April 9, 1983]
[Kota Kinabalu — Originating Summons No. K.129 of 1981]

Company Law – Company winding-up – Disposal of land after commencement of winding-up proceeding null and void – Companies Act, 1965, ss. 223 & 293 – Bankruptcy Act, 1967, s.53

In this case the winding-up of Taulani Sdn. Bhd. (the company) commenced on June 12, 1978. The company, as transferor, and the plaintiff and 3 others, as transferees, executed the Memorandum of Transfer on July 5, 1979. It was presented for registration on July 9, 1979. The High Court held that the disposition of the land (the property of the company) was void *ab initio* under section 223 of the Companies Act 1965 and ordered that the registration of transfer be cancelled.

The plaintiffs applied for an order to set aside the said Order of Court.

The Asst. Official Assignee as Official Receiver and Provisional Liquidator for the 2nd Defendant submitted, *inter alia*, that even if the date of the execution of the Sale and Purchase Agreement was taken to be the date of disposition of the said land, it was well within 6 months immediately before the commencement of the winding-up proceedings and therefore caught by section 293 of the Companies Act 1965.

Held, dismissing the plaintiffs' application: even if the date of executing the Sale and Purchase Agreement (April 24, 1978) was taken to be the date of disposal of the land, the disposal or the transfer of the said land by the company was void by virtue of section 293 of the Companies Act.

ORIGINATING SUMMONS.

Abdul Razak Rouse for the plaintiffs.
C.I. Robertson for the first defendant.

Cur. Adv. Vult.

Wan Mohamed J.: The Plaintiffs in this case, Datin Hajjah Zaleha bte Mjamal and 3 Others vide Originating Summons No.K.129 of 1981, apply for an order to set aside the Order of the Court dated July 6, 1981 made in *Originating Summons No.K.45 of 1981* in which Perkasa Trading Sdn. Bhd. (Defendant No.1 in O.S. No. K.129/1981) was the Applicant and Taulani Sdn. Bhd. (Defendant No.2 in O.S. No.K.129/1981) was the Respondent together with 2 Others. In order to understand the present case before me I have to give a summary of the case in Originating Summons No.K.45 of 1981.

The Perkasa Trading Co. applied to the Court for an order declaring the disposal of the piece of land in question by Taulani Sdn. Bhd. to Datin Hajjah Zaleha bte Mujamal and 3 Others (Plaintiffs in O.S. No.K.129 of 1981) to be void *ab initio* and of no effect as provided by section 223 of the Companies Act, 1965, and subsequently for an order that the registration of that transfer be cancelled and also to have the Prohibitory Order lodged by the Applicants registered. Section 223 of the Companies Act, 1965, reads:

> "Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding-up by the Court shall unless the Court otherwise orders be void."

The matter to be considered in this application by the Perkasa Trading Sdn. Bhd. is therefore to examine whether the disposal of the land belonging to Taulani Sdn. Bhd. (the transferor) was made after the commencement of the winding-up proceeding. It is found as of fact that the Government of Malaysia presented winding-up petition on Taulani Sdn. Bhd. on June 12, 1978 vide Kota Kinabalu High Court Companies Winding-up Petition No. 4 of 1978. By virtue of Section 219 of the Companies Act, 1965, the date of the commencement of the winding-up of a company is the date of the presentation of the petition for the winding-up. It is therefore clear that the winding-up of the

Taulani Sdn. Bhd. commenced on June 12, 1978. I then referred to the Memorandum of Transfer, a copy of which marked "LN.4" is attached to the Affidavit in support of the application. I found Taulani Sdn. Bhd., as transferor, and Datin Hajjah Zaleha bte Mujamal and 3 Others, as transferees, executed the Memorandum of Transfer on July 5, 1979 and it was presented for registration on July 9, 1979.

From the above it is very clear to me that the disposal or transfer of the piece of land belonging to Taulani Sdn. Bhd. was made well after the commencement of the winding-up by the Court. I, therefore, held that the disposition of the land (the property of the company) was void and order that the registration of the transfer be cancelled.

It is respect of this order that the Plaintiffs (Datin Hajjah Zaleha bte Mujamal & 3 Others) in the present case before me filed an originating Summons seeking an order of the Court to set aside the above order, as the result of which the Plaintiffs would remain to be the registered and beneficial owners of the piece of land in question or that the disposal or the transfer of the land by Taulani Sdn. Bhd. to the Plaintiffs (Datin Zaleha bte Mujamal & 3 Others) is valid and properly registered. Perkasa Trading Sdn. Bhd. is cited as Defendant No.1 and Taulani Sdn. Bhd. as Defendant No.2

The Plaintiffs make this application to set aside the above order on the grounds that the 1st Defendant failed to serve a notice of the proceedings on the Plaintiffs as the parties affected which resulted in non-disclosure of the full facts of the matter. The Counsel for the Plaintiffs himself swore the affidavit and supplementary affidavit in support of the Originating Summons. I shall deal with contents later. The application was opposed by both the Defendants. The 1st Defendant is represented by Mr. C.I. Robertson of Skinner Lind Robertson Pang & Willie, while the 2nd defendant, a company in the process of winding-up, is represented by the Assistant Official Assignee Sabah as the Official Receiver and Provisional Liquidator.

The fact that Defendant No.1 failed to serve a notice of the proceedings on the Plaintiffs cannot be the ground which would nullify the order of the Court in Originating Summons No.K.45 of 1981 dated July 6, 1981. This is so because the application of the 1st Defendant was based entirely on the question as to whether the disposition of the land in question by Taulani Sdn. Bhd. (the 2nd Defendant) was void as provided by section 223 of the Companies Act, 1965. However, a third party who is affected and aggrieved by such an order is at liberty to apply to the Court by way of an originating summons to have the order set aside. I, therefore, hold that this application by the Plaintiffs is properly filed and I have to consider the merits of it.

The Counsel for the Plaintiffs in his written submission refers to the affidavit and the supplementary affidavit in support of the application. The subject matter of this application is a piece of land held under Kota Kinabalu Town Lease 017506571 and shall be referred to as "the said land". The owner of the said land is Taulani Sdn. Bhd. (2nd Defendant in this case). In January 1974, Defendant No.2 charged the said land to Chung Khiaw Bank Bhd., in order to get an overdraft facility to a limit of $500,000/-. In 1977 the outstanding balance in the overdraft account owed by the 2nd Defendant to the bank was $739,829.95. The late Datu Aliuddin bin Datu Harun was then the guarantor for the 2nd Defendant. Some negotiations took place between the bank and Taulani Sdn. Bhd. together with the guarantor. Pursuant to the negotiation and the demand by the Chung Khiaw Bank Bhd., the following agreement was reached between the Taulani Sdn. Bhd. and the late Datu Aliuddin bin Datu Harun: (1) Datu Aliuddin was to settle the amount which Taulani Sdn. Bhd. owed the bank; (2) the said land which was charged to the bank would go to Datu Aliuddin for a total sum of $780,000/- according to the letter marked "TJ.1" attached to the affidavit of Taulani bin Hj. Jalaluddin sworn on September 15, 1982, on the condition that Datu Aluuddin would let out the premises to Taulani Sdn. Bhd. for a period of five years on a monthly rental of $2,000/- and also with an option that Taulani Sdn. Bhd. be allowed to buy back or repurchase the said land.

On the instruction of the late Datu Aliuddin, Encik Abdul Razak Rouse, after the death of Datu Aliuddin, paid and settled the overdraft owed by Taulani Sdn. Bhd. to the bank on October 5, 1977. A Memorandum of Discharge of the said land was then executed by the bank but it was not registered until 12th November, 1980. Earlier, the late Datu Aliuddin sent a letter to his solicitor, Encik Abdul Razak Rouse, instructing him to settle the bank and at the same time sent a letter to the

bank with a copy to Encik Abdul Razak Rouse – letters marked "ARR.1" and "ARR.2" respectively attached to the affidavit of Encik Abdul Razak Rouse sworn on November 30, 1981. According to the two letters the late Datu Aliuddin did not only agree to settle the amount owed by Taulani Sdn. Bhd. to the bank but he agreed to have the said land transferred to his wife and three daughters (the Plaintiffs in this case). Encik Abdul Razak Rouse besides settling the amount due to the bank did not take any step to have the land transferred to the Plaintiffs until the 5th day of July, 1979, when he caused the Memorandum of Transfer to be executed by Taulani Sdn. Bhd. as the transferors and the Plaintiffs, Datin Hajjah Zaleha bte Mujamal & 3 Others, as the transferees. However, on the 24th day of April, 1978, he caused a Sale and Purchase Agreement to be executed by Taulani Sdn. Bhd. (the 2nd Defendant) and the Plaintiffs – See "ARR.4" attached to the affidavit of Abdul Razak Rouse sworn on November 30. 1981. The Counsel for Plaintiffs contends that Taulani Sdn. Bhd. had in fact disposed the land to the late Datu Aliuddin or his nominees on October 5, 1977 when he, Abdul Razak Rouse, settled the amount of overdraft owed by Taulani Sdn. Bhd. to the bank; and that the Sale and Purchase Agreement was made just to confirm the purchase made by the late Datu Aliuddin. The Counsel for Plaintiffs also avers that the Memorandum of Transfer was not executed earlier because the vendor, Taulani Sdn. Bhd., was given the option to repurchase the said land within five years from the 5th day of October, 1977.

The Counsel for the 1st Defendant in his written submission dealt with the complaint of the Plaintiffs that they were not served with the Summons in Originating Summons No.K.45 of 1981. Since I had already given my ruling on this point I shall pass on to other relevant points raised by him.

(1) The Sale and Purchase Agreement dated April 24, 1978 – "ARR.4", contains a clause giving an option to the vendor. Taulani Sdn. Bhd., to repurchase the said land up to October 4, 1982 and yet the Memorandum of Transfer was executed on July 5, 1979.

(2) The disposition of the said land is void because it only became effective on the date of registration – quoting section 88 of the Sabah Land Ordinance, (Cap. 68). The date of registration is on July 9, 1978, whereas the winding-up proceedings of Taulani Sdn. Bhd. commenced on June 12, 1978. The disposition therefore becomes null and void under section 223 of the Companies Act, 1965.

(3) He also submits that the disposition of the said land is void by virtue of section 293 of the Companies Act, 1965 to be read together with section 53 of the Bankruptcy Act – supporting the submission of the Assistant Official Assignee.

(4) The 1st Defendant had in 1976 obtained two judgments against Taulani Sdn. Bhd. for a total sum of $146,007.46. Taulani Sdn. Bhd. remains indebted to the 1st Defendants. The 1st Defendants caused Prohibitory Order to be registered against the said land from time to time. The disposal or attempt to dispose the said land by the Taulani Sdn. Bhd. was therefore fraudulent.

The Assistant Official Assignee Sabah as Official Receiver and Provisional Liquidator for the 2nd Defendant in his written submission referred to the affidavit sworn by him and the affidavit of Hj. Taulani bin Hj. Jalaluddin and raised the following points:–

(a) The purported Sale and Purchase Agreement relied upon by the Plaintiffs constitutes a fraudulent preference under bankruptcy law and is therefore void as against the liquidator;

(b) There is no provision in the Sale and Purchase Agreement for the transfer of the said land to the Plaintiffs.

Amplifying the first point, the Assistant Official Assignee gave a brief account of what had taken place in respect of the said land from the time it was first charged to the bank to the time it was transferred and registered in the names of the Plaintiffs. The events related by the Assistant Official Assignee is almost the same as that told by the Counsel for the Plaintiffs and Counsel for Defendant No.1. The Assistant Official Assignee Sabah contends that the disposition of the said land by Taulani Sdn. Bhd. is void and caught under section 293 of the Companies Act, 1965 or as in the case of a bankruptcy proceeding under the bankruptcy law, viz; section 53 of the Bankruptcy Act, 1967. The effect of section 293 of the Companies Act is as follows:

Any transfer of property belonging to a company made within six months immediately before the presentation of a winding-up petition shall

be void as against the liquidator.

It is an undisputed fact that the Sale and Purchase Agreement was executed on April 24, 1978 and the winding-up petition was presented on June 12, 1978. Even if the date of the execution of the Sale and Purchase Agreement is taken to be the date of the disposition of the said land, the Assistant Official Assignee Sabah submits that it is well within six months immediately before the commencement of the winding-up proceedings and therefore caught by section 293 of the Companies Act 1965.

I do not agree with the contention of the Assistant Official Assignee and the Counsel for Defendant No.1 that the Sale and Purchase Agreement does not provide for the transfer of the land to the Plaintiffs. One cannot be right to say that there was not intention on the part of the vendor to transfer a piece of land to the purchaser just because there is an agreement to the effect that the vendor is given the opinion to buy back the land within a certain period and that the purchaser is to let or lease out the said land to the vendor for a certain sum of monthly rental. On the other hand, I cannot agree with the submission of the Counsel for Plaintiffs that the delay in transferring the land is due to the fact that the vendor had an option to buy back the said land within certain fixed period. The proper steps to be taken by the purchaser is to have the land transferred to him either immediately or within a reasonable time. The buying back of the said land (within prescribed period) by the vendor is a separate dealing altogether. It will only happen when the vendor chooses to exercise the option. Since the option to buy back the land within a certain period is taken to be the reason for not transferring the said land within a reasonable time, the proper inference is that no transfer of the land was actually intended at least until the period to buy back is over or that the arrangement was that if the owner of the land is unable to pay back the amount of money he received from the vendor or would-be purchaser within the prescribed period, then the land shall be transferred to the vendor or would-be purchaser.

From the affidavits and documents attached thereto, I find that although Taulani Sdn. Bhd. had the intention to transfer the said land to the late Datu Aliuddin or his nominees the intention was never made effective in that no transfer was executed. The fact that the Counsel for the Plaintiffs carried out the instructions of the late Datu Aliuddin after the death of the latter does not amount to the purchase of the land as no steps were taken to have the land transferred until very much later. In fact, no transfer of the land was attempted to be made until well after the Sale and Purchase Agreement was executed. In my view the contract of sale and purchase of the said land between the parties began to exist on April 24, 1978, i.e. on the date of the Sale and Purchase Agreement was executed. I do not agree with the contention of the Counsel for the Plaintiffs that the purchase of the land was completed or had taken place on the date he paid the bank $739,829.95 in settling the amount which Taulani Sdn. Bhd. owed the bank.

Although it is provided in the Real Property Gains Tax Act, 1976 that the date of executing the Sale and Purchase Agreement shall be the date of acquiring or disposing a property for the purpose of calculating or computing the tax, for all other intents and purposes the date of disposing a property, especially by a company, shall be the date of registering such a disposal or transfer the disposal of which is required to be registered by the law. However, even if the date of executing a Sale and Purchase Agreement is taken to be the date of disposal of the said land it is still clear that the disposal or the transfer of the said land by Taulani Sdn. Bhd. is void by virtue of section 293 of the Companies Act.

In the above premises, I hold that the transfer of the said land by Taulani Sdn. Bhd. to the Plaintiffs is null and void and order that the application by the Plaintiffs to set aside the order dated the July 6, 1981, is dismissed with costs to the Defendants to be taxed.

Application dismissed.

Solicitors: *Rayner & Co.; Skinner Lind Robertson Pang & Willie*